

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

COHEN & COMPANY,)	
)	
Petitioner,)	
)	
v.)	
)	Civil Action No. 1:96 CV 1396
UNITED STATES OF AMERICA and)	
ANNE K. BINGAMAN, Assistant)	Hon. Donald C. Nugent
Attorney General, U.S. Department)	
of Justice, Antitrust Division,)	
)	
Respondents and)	
Cross Petitioners.)	

CROSS-PETITION FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND NO. 14993 AND ANSWER TO PETITION OF COHEN & COMPANY REGARDING COMPLIANCE

The United States of America and Anne K. Bingaman, Assistant Attorney General of the Antitrust Division of the United States Department of Justice, by their undersigned attorneys, hereby (1) petition this Court pursuant to Section 1314(a) of Title 15, United States Code, to enter judgment on the pleadings enforcing Civil Investigative Demand ("CID") No. 14993, which was duly issued and served on Cohen & Company, and (2) answer Cohen & Company's "Petition Regarding Compliance" as follows.

CROSS-PETITION FOR ENFORCEMENT

Pursuant to 15 U.S.C. §1314(a), the United States and Anne K. Bingaman request that this Court order Cohen & Company to comply with the requirements of CID No. 14993, and as grounds state as follows:

1. In enacting and amending the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§1311

et seq. (1994), Congress provided the Antitrust Division (the "Division") with broad pre-complaint powers to investigate possible violations of the federal antitrust laws. More specifically, ACPA Section 3(a), 15 U.S.C. §1312(a) (1994), empowers the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue a CID to any person who they have reason to believe "may be in possession, custody, or control of any documentary material, or may have information, relevant to a civil antitrust investigation." Such a CID may require the recipient "to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony . . . , or to furnish any combination of such material, answers or testimony."

2. The Division is currently conducting an investigation into possible violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, in connection with the delivery of hospital and medical services and the health care insurance market in Ohio.

3. In the course of this investigation, the Antitrust Division has issued and served a number of CIDs, and various entities have complied by producing to the government documents and responses to interrogatories, or by providing oral testimony.

4. On November 7, 1994, one CID recipient, Blue Cross Blue Shield Mutual of Ohio ("BCBSMO"), petitioned this Court to set aside its CID on the ground that the CID "seeks documents and information which are relevant to conduct which is outside the scope of and does not violate Section 1 or 2 of the Sherman Act." On January 5, 1995, the United States responded to this Petition and cross-petitioned for enforcement of the CID. On June 24, 1996, this Court (Aldrich, J.) filed a memorandum and order denying in full BCBSMO's petition to set aside the CID, and granting the United States's Cross-Petition. In its opinion, this Court rejected each of BCBSMO's contentions, specifically holding that the CID "is reasonably related to a legitimate government investigation."

Blue Cross Blue Shield of Ohio v. United States, Civil No. 1:94 CV 2297 (June 24, 1996) slip op. at 13. BCBSMO was required to comply in full with this CID by July 8, 1996, but has failed to produce any documents or responses.

5. During its investigation, the Antitrust Division learned that Cohen & Company, an accounting firm, assisted BCBSMO in those activities which are the focus of this investigation, and that it has in its possession, custody, or control documents and other information relevant to this investigation. Cohen & Company is found or transacts business at 1300 Bond Court Building, Cleveland, Ohio 44114, which is within the jurisdiction of this Court.

6. On June 5, 1996, CID No. 14993, directing Cohen & Company to produce documentary material relevant to this investigation in Cohen & Company's possession, custody, or control, was duly issued, and was served on June 8, 1996, in accordance with 15 U.S.C. 1312(e)(1)(C) (1994), by depositing it in the United States mails, by certified mail, return receipt requested, addressed to Cohen & Company at its principal place of business.

7. In a telephone conversation with William Joseph, Manager of Cohen & Company, the Division agreed to Cohen & Company's request for an extension of time for the production of documents until June 28, 1996, and arranged to discuss logistical aspects of Cohen & Company's compliance with the CID.

8. On June 19, 1996, Kenneth A. Bravo, counsel for Cohen & Company, informed the Division that BCBSMO intended to file an Amended Petition asking this Court to set aside CID No. 14993, that Cohen & Company did not itself object to the CID, and that it intended to comply with the CID fully in the event that BCBSMO did not file an Amended Petition.

9. On June 20, 1996, the Division responded by letter to Mr. Bravo, stating its position that regardless of BCBSMO's actions, Cohen & Company is obligated under the ACPA, 15 U.S.C.

§§ 1311-1314, to produce the documents called for which are in its "possession, custody, or control."

10. On June 25, 1996, Mr. Bravo informed the Division that Cohen & Company now intended to comply with the CID, whether or not BCBSMO filed an Amended Petition. Accordingly, the United States and Cohen & Company agreed that Cohen & Company would mail certain responsive documents to the government no later than June 27, 1996, and would review the remaining materials to determine the most expeditious means for their production. During this conversation, Mr. Bravo also stated that very few of the responsive documents involved communications with BCBSMO, and that the greatest percentage of the documents were obtained from various hospitals in the region. He further explained that BCBSMO is specifically prohibited from access to most of the documents responsive to the CID.

11. On June 27, 1996, after this Court ordered BCBSMO to comply with its CID, Mr. Bravo again telephoned the attorneys for the government and stated that BCBSMO had contacted Cohen & Company, and informed Cohen & Company that it was obligated, through a provision in its consulting agreement with BCBSMO, not to provide the documents that are the subject of the CID and to file its own petition in the district court to set aside the CID. Mr. Bravo reiterated Cohen & Company's willingness to comply with the CID in the absence of BCBSMO's demands, but stated that, as a result of BCBSMO's actions, Cohen & Company would not be producing these documents and would, instead, be filing its own petition.

12. On June 27, 1996, Cohen & Company filed its self-styled "Petition Regarding Compliance," asking only that this Court determine whether it need comply with the CID in light of BCBSMO's demands, but raising no objection of its own to the production of the requested documents. By letter dated June 28, 1996, the United States notified Cohen & Company of a number of defenses to its Petition, and asked Cohen & Company voluntarily to withdraw its Petition. Cohen

& Company did not respond to this letter.

13. The documents sought by CID No. 14993 are not already in the possession of the United States, are relevant to a valid investigation, and are not exempt from disclosure. Cohen & Company has failed to produce any documents in response to CID No. 14993.

14. Cohen & Company's continuing failure to comply with the CID has impaired the Antitrust Division's ability to obtain documentary material and information needed to complete in a timely manner the investigation described in this Petition. The activities under investigation are not exempt from the Sherman Act, and Judge Aldrich has already determined that the investigation is legitimate and that a CID issued in connection with it is "reasonably related to a legitimate government investigation."

15. To the extent that Cohen & Company has legitimate interests in preserving the confidentiality of documentary material and information required by the CID, those interests are adequately protected by the express restrictions against disclosure embodied in the ACPA Sections 4(c)(3) and 5(g), 15 U.S.C. §§ 1313(c)(3) & 1314(g) (1994).

16. The documentary material and information required by the CID are not protected from disclosure under the standards applicable to subpoenas issued in aid of grand jury investigations or the standards applicable to discovery requests under the Federal Rules of Civil Procedure that are appropriate and consistent with the purposes and provisions of the ACPA.

17. Cohen & Company asserts no valid ground for its failure to comply with the CID. The lack of substantive merit to the only ground offered in Cohen & Cohen's Petition is set forth below and in the Memorandum In Support Of Government's Cross-Petition For Enforcement Of Civil Investigative Demand No. 14993 And In Opposition To Cohen & Company's "Petition Regarding Compliance."

WHEREFORE, the United States and Anne K. Bingaman respectfully request that this Court:

1. Order Cohen & Company to comply with the requirements of CID No. 14993 within fourteen days of the Court's Order;
2. Assess against Cohen & Company all costs of the United States in maintaining this action; and
3. Grant such other and further relief as is just and proper.

**ANSWER TO COHEN & COMPANY'S
PETITION REGARDING COMPLIANCE WITH
CIVIL INVESTIGATIVE DEMAND NO. 14993**

In accordance with Fed. R. Civ. P. 8(b), the Respondents/Cross-Petitioners answer Cohen & Company's Petition Regarding Compliance with Civil Investigative Demand No. 14993 as follows:

First Defense

Cohen & Company's Petition does not comply with the ACPA, 15 U.S.C. §§ 1311-1314, in that it fails to assert any claim or grounds for relief under the Act.

Second Defense

Cohen & Company's Petition does not comply with the ACPA, 15 U.S.C. §§ 1311-1314, in that the only rights or interests asserted are those of BCBSMO, and the ACPA does not permit the recipient of a CID to assert the rights of a third party.

Third Defense

The Consulting Agreement between BCBSMO and Cohen & Company cannot vary the express statutory authority of the Antitrust Division to investigate potentially unlawful conduct.

Fourth Defense

The activities under investigation are not exempt from the Sherman Act, 15 U.S.C. § 1 et seq., and the investigation is within the federal antitrust law enforcement authority of the United States Department of Justice.

Fifth Defense

The documentary material and information required by the CID are not protected from disclosure under the applicable provisions of the ACPA, 15 U.S.C. §§ 1311-1314.

Sixth Defense

The Consulting Agreement between BCBSMO and Cohen & Company does not prohibit production of the requested documents.

Seventh Defense

To the extent that Cohen & Company or any other entity has legitimate interests in preserving the confidentiality of the documentary material and information required by the CID, those interests are adequately protected by the express restrictions against disclosure embodied in the ACPA, 15 U.S.C. §§ 1313(c)(3) & 1314(g).

Eighth Defense

Cohen & Company's Petition should be dismissed for failure to state a claim upon which relief can be granted.

Ninth Defense

Responding to the numbered paragraphs as set forth in Cohen & Company's Petition:

1. Respondents/Cross-Petitioners admit that Cohen & Company seeks an order determining whether it must comply with CID No. 14993, but deny that such Petition is pursuant to the ACPA, 15 U.S.C. §§ 1311-1314.
2. Respondents/Cross-Petitioners deny the allegations contained in paragraph 2.

3. Respondents/Cross-Petitioners admit that Cohen & Company is an accounting firm which has performed services for BCBSMO, but are otherwise without knowledge with regard to the other averments in this paragraph.

4. Respondents/Cross-Petitioners admit that a copy of the Consulting Agreement between BCBSMO and Cohen & Company was attached to the Petition, deny that the quoted sections accurately reflect the undertakings of the parties under the Consulting Agreement, deny that the terms of such an Agreement are relevant to a petition brought under the ACPA, 15 U.S.C. § 1314, and are otherwise without knowledge or information sufficient to form a belief as to the truth of the balance of the factual averments of paragraph 4.

5. Respondents/Cross-Petitioners admit the allegations contained in paragraph 5.

6. Respondents/Cross-Petitioners admit that they are conducting an investigation involving, *inter alia*, the use of Most Favored Nations and Most Favorable Rates clauses in the Northern Ohio area, but otherwise deny the averments in paragraph 6.

7. Respondents/Cross-Petitioners admit the allegations contained in paragraph 7.

8. Respondents/Cross-Petitioners are without knowledge or information sufficient to form a belief as to the truth of the factual averments in paragraph 8.

9. Respondents/Cross-Petitioners are without knowledge or information sufficient to form a belief as to the truth of the factual averments in paragraph 9 but deny that such averments constitute a "Claim For Relief," as asserted by Cohen & Company.

10. Respondents/Cross-Petitioners deny each and every allegation contained in any part of the Petition not specifically herein admitted.

WHEREFORE, the United States and Anne K. Bingaman respectfully request that this Court:

1. Deny Cohen & Company's "Petition Regarding Compliance," and order it to comply with the requirements of CID No. 14993 within fourteen days of the Court's Order;
2. Assess against Cohen & Company all costs of the United States in maintaining this action; and
3. Grant such other and further relief as is just and proper.

UNITED STATES OF AMERICA AND
ANNE K. BINGAMAN, Assistant Attorney General

By their Attorneys,

Paul J. O'Donnell
Jesse M. Caplan
Evelio J. Yera

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Washington, D.C. 20530

Dated: July ____, 1996

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this ____ day of July, 1996, I caused a copy of the foregoing CROSS-PETITION FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND NO. 14993 AND ANSWER TO PETITION OF COHEN & COMPANY REGARDING COMPLIANCE to be served on counsel of record for Petitioner Cohen & Company, by U.S. Mail, at the following address:

Kenneth A. Bravo
Ulmer & Berle P.L.L.
Bond Court Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583

Paul J. O'Donnell